Supreme Court, U.S.
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No. 09-914

IN THE
Supreme Court of the United States

JACK A. MARKELL, GOVERNOR OF THE STATE OF DELAWARE, AND WAYNE LEMONS, DIRECTOR OF THE DELAWARE STATE LOTTERY OFFICE,

Petitioners,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL, THE NATIONAL BASKETBALL ASSOCIATION, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NATIONAL FOOTBALL LEAGUE AND THE NATIONAL HOCKEY LEAGUE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Professional and Amateur Sports Protection Act ("PASPA") prohibits Delaware from offering sports lotteries to generate revenues to help alleviate its substantial budget deficits and satisfy its constitutional balanced-budget obligations.

2. Whether the panel below erred as a matter of law in deciding the merits in an appeal of a denial of a preliminary injunction brought pursuant to 28 U.S.C. § 1292(a), where the factual record had not been developed and final adjudication of the merits turned on contested factual considerations.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding below.

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PETITION FOR CERTIORARI

Petitioners, Jack Markell, Governor of the State of Delaware, and Wayne Lemons, Director of the Delaware State Lottery Office (collectively "Delaware"), petition for a writ of certiorari to review the judgment of the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion (App. 1a-20a) is reported at 579 F.3d 293 (3d Cir. 2009). The order denying Delaware's petition for rehearing en banc (App. 59a-60a) is not reported. The district court denied Plaintiffs-Respondents' motion for a preliminary injunction in an August 5, 2009 oral ruling (App. 29a-58a), which was confirmed in an August 10, 2009 written order (App. 21a-28a). Neither district court ruling is reported, but the August 10, 2009 ruling is available at 2009 WL 2450284 (D. Del.).

JURISDICTION

The court of appeals entered its opinion and judgment on August 31, 2009. App. 1a. Delaware filed a timely petition for rehearing on September 14, 2009, which was denied on September 29, 2009. App. 60a. Delaware timely sought an extension of time for the filing of a petition for certiorari on December 18, 2009. That motion was granted on December 21, 2009, extending the time for filing until January 27, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions involved – the Tenth Amendment of the Constitution and Sections 3701, 3702 and 3704 of Title 18, the Professional and Amateur Sports Protection Act – are set forth at App. 61a-64a.

INTRODUCTION AND SUMMARY OF ARGUMENT

By this petition, the State of Delaware seeks to vindicate its traditional and fundamental right to raise revenues in the manner it deems fit in a time of fiscal crisis. Based on Delaware's historic use of a sports-lottery scheme to raise funds, Congress exempted Delaware (and several similarly-situated states) from the prohibition on sports gambling enacted in the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704. But, when Delaware sought to address its budget needs by reinstituting a sports lottery, plaintiffs here – the Office of the Commissioner of Baseball ("MLB"), the National Basketball Association ("NBA"), the National Collegiate Athletic Association, the National Football League ("NFL"), and the National Hockey League ("NHL") (collectively, "Sports Leagues") – filed an eleventh-hour lawsuit to enjoin Delaware from conducting its sports lottery.

The district court denied the preliminary injunction motion, but nevertheless expedited disposition of the case. On appeal, and absent any request by the Sports Leagues, the Third Circuit converted their appeal from the denial of injunctive relief into an appeal on the underlying merits of the lawsuit. The court enjoined Delaware from conducting the specific lottery games it had announced and issued broad prohibitions on future Delaware games – prohibitions

that will prevent Delaware from effectively exercising important rights Congress expressly reserved to it. App. 19a-20a. The court acted even though Delaware had not had an opportunity to brief or present evidence to the trial court relevant to the scope of the sports-gambling games Congress preserved for the State.

The PASPA exceptions at issue are relevant only to the few States that had sports-gambling schemes prior to its enactment. It is thus improbable that a mature conflict on their interpretation will develop. Yet, the Third Circuit has permanently stripped Delaware of an historic sovereign prerogative that Congress had preserved and the State had invoked to address its fiscal challenges. The scope of this PASPA exception is of critical importance to Delaware which sought to exercise its reserved authority under PASPA as part of a comprehensive response to its budget crisis. And, this ruling was announced in an unfair, truncated proceeding in which Delaware was denied the opportunity to proffer evidence relevant to the scope of its retained rights. Where, as here, the matter touches on State sovereignty, involves interpretation of a federal statute, is of vital importance to the affected State, and the issue will otherwise escape review, this Court should grant the petition.

Moreover, the court of appeals decision contravenes this Court's precedent and is the product of several legal errors which independently warrant review.

PASPA's general prohibition on sports gambling does not apply to a sports-gambling scheme in a State "to the extent that the scheme was conducted by that State . . . at any time during the period beginning January 1, 1976, and ending August 31, 1990." 28 U.S.C. § 3704(a)(1). The court of appeals found that

this language is plain. It refused to apply to this provision this Court's instruction that a statute should not be interpreted to constrain a State's "substantial sovereign powers" unless Congress makes that constraint ""unmistakably clear."" *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). Instead, it held that Delaware retained the power to offer a sports lottery only to the "degree" it had "actually conducted" a sports lottery, App. 14a-15a (emphasis omitted), and therefore that Delaware could not even apply its past lottery scheme "to new sports," App. 19a, or offer a lottery on single games.

The Third Circuit's cramped interpretation of Congress's reservation of State authority cannot be reconciled with *Gregory* and its progeny. The court of appeals found that PASPA's *general prohibition* of sports gambling is a "clear statement" under *Gregory*, App. 17a-18a; but it was applying the requirement to the wrong statutory provision. The court erroneously failed to consider whether the express *statutory preservation of Delaware's rights* "unmistakably" forbid the State to conduct the sports lottery it proposed.

It does not. The statutory phrase can fairly be read to reserve to Delaware the right to offer any sports lottery that State law permitted in the 1970's. Indeed, the legislative history detailed *infra* strongly supports the State's reading. At a minimum, by preserving Delaware's right to conduct a "scheme" that it conducted in the 1970's, PASPA allows Delaware to conduct a state-controlled sports lottery akin to those that were part of the 1970's scheme and does not restrict Delaware to the specific sports or rules used to flesh out that scheme.

The Third Circuit's contrary conclusion contravenes Congress' intent and is wrong. Had the Third Circuit

recognized PASPA's ambiguity, it would have considered, *inter alia*, the relevant Senate Report, which states that PASPA "is not intended to prevent Oregon or Delaware from expanding their sports-betting schemes into other sports so long as it was authorized by State law prior to the enactment of this Act," S. Rep. No. 102-248, at 10 (1991). It also would have allowed the development of an evidentiary record about whether the proposed sports lottery differs substantially from the sports lottery prior to PASPA.

The court of appeals' failure to recognize the Act's ambiguity led to another legal error. As noted, that court *sua sponte* converted the Sports Leagues' appeal of the denial of the preliminary injunction to an appeal on the underlying merits. The court held, *as a matter of law*, that no factual development would illuminate whether Delaware's proposed sports-gambling scheme is sufficiently similar to Delaware's past scheme to be lawful under PASPA. This error could have been avoided had the court remanded the case to allow the district court to consider evidence that Delaware would have offered – *i.e.*, expert testimony that a sports lottery on a slate of NFL games constitutes the same scheme as a sports lottery on a slate of MLB games, or that as a matter of statistical probabilities, betting on multiple NFL games is not significantly different than betting on single games. See *infra* at 17.

This Court has stated that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). Federal courts do so only where "the facts are established or of no controlling relevance," *Thornburgh* v. *Am. Coll. of Obstetricians &*

Gynecologists, 476 U.S. 747, 757 (1986). Such action is even more extraordinary where, as here, plaintiffs did not request merits review, and the trial court had *declined* to issue a preliminary injunction prior to full briefing on the motion, foreclosing the State's ability to proffer its evidence before appeal.

The question whether Delaware's proposed sports lottery is sufficiently similar to its past lottery to pass muster under PASPA is not a matter of judicial intuition. It is a fact-intensive question that is the proper subject of expert and other testimony. The court's decision to address the merits here contravenes this Court's decisions and those of numerous courts of appeals holding that an appellate court may decide the merits on review of a preliminary injunction *only* in cases presenting a pure legal issue and requiring *no* factual development. See *infra* at 30.

The court of appeals infringed upon the State's sovereign prerogative to raise revenues and address its budget problems. This outcome is acceptable only where Congress "unmistakably" states that it is taking such action; but here, Congress preserved Delaware's traditional authority. This Court should grant the petition and provide Delaware with the opportunity to make its case that the court of appeals denied it.

STATEMENT OF THE CASE

1. *Delaware's Initial Sports Lottery.* In 1973, the Delaware Constitution was amended to authorize "Lotteries under State control for the purpose of raising funds." Del. Const. art. II, § 17(a). The Delaware General Assembly implemented this constitutional provision in 1974, creating the Delaware State Lottery and State Lottery Office. The

implementing legislation broadly defined "lottery" as "public gaming systems or games established and operated pursuant to this subchapter and including all types of lotteries." Del. Code Ann. tit. 29, § 4803(d). Relevant here, the implementing legislation specifically authorized "any game" including games that "affiliate the determination of the winners of a game with any racing or sporting event held within or without the State." *Id.* § 4805(b)(4).

Pursuant to this authority, in August 1976, the Delaware State Lottery Office announced a plan to institute a sports-based lottery, known as "Scoreboard." *NFL* v. *Delaware*, 435 F. Supp. 1372, 1376 (D. Del. 1977). Scoreboard involved three games (Football Bonus, Touchdown, and Touchdown II) that were based on the outcomes of NFL contests.[1] *Id.*

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[1] The three games had a range of features. In Football Bonus, the fourteen NFL games scheduled each weekend were divided into two seven-game pools. Customers projected the winners of the seven games in one or both pools and bet between $1 and $10. To win, the customer had to correctly select the winner of all games in a pool. The prizes awarded were determined on a pari-mutuel basis (*i.e.*, as a function of the amount of money bet by *all* customers). *See NFL*, 435 F. Supp. at 1376.

In Touchdown, a lottery card listed the fourteen games for each week with three possible point-spread ranges. The customer had to select the winning team and the winning margin in three, four or five games. A customer would bet between $1 and $10, and prizes were distributed on a pari-mutuel basis. *Id.*

Finally, in Touchdown II, prior to each weekend's games, a predicted point or "line" would be published. Customers considered that point spread and selected a team to "beat the line" (to do better than the stated point spread). To win, the customer had to choose correctly in from four to twelve games.

Tickets for these games could be purchased from merchants throughout the State. *Id.*

Immediately thereafter, the NFL sued to enjoin Delaware's lottery. *Id.* at 1375. The district court rejected the NFL's request for a temporary restraining order and most of its claims. *Id.* at 1375, 1391.

During this time period, Delaware actively considered expanding its lottery to other sports. Specifically, lottery officials contemplated whether to change the types of games offered and whether to expand the lottery to hockey and basketball contests.[2] Delaware, however, ceased offering a sports lottery after the 1976 NFL season.

2. *PASPA's Enactment.* Delaware is not the only state to offer sports betting. Nevada had long offered single-game sports wagering; and in September 1989, Oregon also initiated a lottery based on NFL games that it subsequently expanded to NBA games. 137 Cong. Rec. 255, 256 (1991). Shortly after Oregon did so, Congress began to consider legislation to prohibit the States to raise revenues through sports-based lotteries. See, *e.g.*, *id.*; H.R. 4842, 101st Cong. (1990); S. 474, 102d Cong. (1991).[3]

Although the Department of Justice expressed strong concerns that the legislation raised "federal-

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Based on the number of games bet, the prize was a fixed payoff of $10 to $1,200. *Id.*

[2] *See, e.g.*, Simmons Dep., at 76-77, *NFL* v. *Tribbitt*, No. 76-273 (D. Del. Aug. 20, 1976) (Director of the Delaware State Lottery Office); *id.* at 206-08, 226-27 (D. Del. Oct. 27, 1976); Stipulation of Facts, ¶ 31, *id.* (D. Del. Nov. 15, 1975).

[3] As Congress considered this legislation, Montana enacted a statute that "allow[ed] for fantasy sports leagues and sports tab games." 138 Cong. Rec. 12971, 12973 (1992).

ism issues" by interfering with states' ability to raise revenues,[4] Congress nonetheless enacted PASPA in 1992. PASPA reflects a substantial legislative compromise. 28 U.S.C. §§ 3701-3704. It prohibits betting on professional and amateur sports, *id.* § 3702, but "grandfathers" the handful of states such as Delaware that had offered sports-gaming schemes prior to PASPA's enactment, *id.* § 3704(a)(1)-(2).[5] Particularly relevant here, § 3704(a)(1) creates an exception from PASPA's sports-betting prohibitions for "a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." This exception encompasses Delaware due to the State's sports-based lottery offered in 1976.

PASPA's legislative history confirms that Congress intended Delaware and the few other grandfathered states to retain the right to offer a broad array of sports-based lotteries. The Senate Report explained:

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[4] *See* Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Joseph R. Biden, Jr., Chairman, Committee on the Judiciary 2 (Sept. 24, 1991); Letter from W. Lee Rawls, to Sen. Dennis DeConcini, Committee on the Judiciary 2 (Sept. 24, 1991).

[5] PASPA also provided a prospective exemption for Atlantic City, New Jersey, 28 U.S.C. § 3704(a)(3). New Jersey, however, did not enact sports gaming in the window PASPA provided and the Act now also prohibits sports gaming in New Jersey. PASPA's constitutionality is being challenged in New Jersey. *See* Complaint, *Interactive Media Entm't & Gaming Ass'n* v. *Eric H. Holder*, No. 2:33-av-00001 (D.N.J., filed Mar. 23, 2009).

> Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation. Neither has the committee any desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry, or to prohibit lawful gambling schemes in other States that were in operation when the legislation was introduced. Therefore, it provides an exemption for those sports gambling operations which were already are permitted under State law . . . .

S. Rep. No. 102-248, at 8.

The Senate Report further clarified that the Senate did not intend PASPA to prevent Delaware from expanding its lottery into other sports beyond football if the new games were permitted under existing State law:

> Under paragraph (1) of subsection (a), Oregon and Delaware may conduct sports lotteries on any sport, because sports lotteries were conducted by those states prior to August 31, 1990. Paragraph (1) is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting.

Id. at 10.

Finally, shortly before the bill's passage, Senator DeConcini, a sponsor and floor manager, explained the purpose of the exceptions:

> The intent of the legislation is not to interfere with existing laws, operations or revenue streams. Therefore, it provides an exemption for those sports gambling operations which already are permitted under State law.
>
> . . . .
>
> Let me make clear that the grandfather provision only allows those States that have sports gambling authorized by State law to continue to do what they are doing now or could do under State law.

138 Cong. Rec. 12971, 12973 (1992).

Reinforcing this point, the bill was changed as it moved toward passage to broaden the relevant exception by removing or enlarging terms that might have suggested a narrower reading. The initial version of the Senate bill permitted a State to offer a lottery or other gambling "activit[ies]"

> to the extent that *such* activity *actually* was conducted by that State prior to August 31, 1990, or was conducted in the State between September 1, 1989, and August 31, 1990.

S. 474 (Feb. 22, 1991) (emphasis added).[6]

Then, when the Judiciary Committee considered the bill, its language was modified to allow lottery or other gambling "scheme[s]" (rather than "activities")

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[6] The "activity actually was conducted" language also appeared in the bill's early House version. *See* 137 Cong. Rec. at 257.

and amended to confirm that the temporal scope of the exception covered Delaware. It also continued to contain language ("particular scheme actually . . . conducted") that narrowed this exception. Specifically, at that time, the exception permitted States to operate lottery and gambling "schemes"

> to the extent that the *particular scheme actually was conducted* by that State or other governmental entity *prior to August 31, 1990.*

Id. (Nov. 23, 1991) (emphasis added).

Finally, upon final Senate consideration of the bill, the terms "particular" and "actually" had been stricken and the temporal application of the exception further clarified to confirm its application to Delaware. In this version, the exception broadly allowed lottery and gambling "scheme[s]"

> to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990.

138 Cong. Rec. at 12972. This language was ratified by the Senate and the House without modification.

3. *Delaware's Fiscal Crisis and Reintroduction of a Sports Lottery.* Delaware, like many states, is facing a fiscal crisis. For the 2010 fiscal year (July 1, 2009 to June 30, 2010), Delaware projected a record budget deficit. Delaware's constitution requires a balanced budget. *In re Request of the Governor for an Advisory Opinion*, 2009 Del. LEXIS 255, at *7 (Del. May 27, 2009).

In March 2009, accordingly, Governor Markell proposed to re-introduce a sports lottery in Delaware as part of a comprehensive solution to the projected budget deficit. As before, the proposed sports lottery

would be under control of the State. Appellants' Third Circuit Appendix ("AA") 164. All revenues earned would "be used for administration of the Delaware Lottery and/or contributed to the General Fund." *Id.*

Also in March 2009, Governor Markell requested the Delaware Supreme Court to issue an advisory opinion on whether the proposed sports lottery would comply with Delaware's Constitution. AA 162. The Governor stated that Delaware intended to offer three different sports-lottery games:

(i) Single Game Lottery: Players must select the winning team in any given contest with a line.

(ii) Total Lottery: Players must select whether the total scoring in a game will be over or under the total line.

(iii) Parlay Lottery: Players must select the winning outcomes on multiple elements, such as the winner of two or more games, the winner of two or more over-under bets, or the winner of one or more games and one or more over-under bets.

AA 164. Unlike its prior lottery that awarded some prizes on a "pari-mutuel" basis, prizes for the new sports lottery would be awarded on a fixed-payout basis. *Id.*

Given the urgency of the fiscal crisis, the General Assembly acted promptly and enacted House Substitute No. 1 to House Bill 100 (hereinafter "the Sports Lottery Act"), which the Governor signed on May 14, 2009. The Sport Lottery Act, *inter alia*, mandated that the Director of the Delaware Lottery "shall" use his existing authority granted in the 1974

lottery legislation to establish a sports lottery (including necessary regulations). Del. Code Ann. tit. 29, § 4825(a). The lottery required the sports lottery to "produce the greatest income for the State while minimizing or eliminating the risk of financial loss to the state." *Id.* The legislation also directed that the lottery be conducted at three existing Delaware "racinos" that offer horse racing and on-site "video" lotteries. *Id.* § 4825(c).[7]

The Delaware Supreme Court accepted the Governor's request to issue an advisory opinion. It held oral argument on May 21, 2009, and permitted the NFL to appear as *amicus curiae*. Six days later, the court issued a unanimous decision generally holding that the proposed games would not violate the Delaware Constitution. *In re Request of the Governor for an Advisory Opinion*, 2009 Del. LEXIS 255.

The court opined that the Delaware Constitution permits "'not only games of pure chance but also games in which chance is the dominant determining factor.'" *Id.* at *21. The court concluded that chance is the "dominant" factor for the proposed parlay games (*i.e.*, games requiring the player to select the winner of two or more elements), but that further evidence needed to be developed to analyze the constitutionality of the proposed single-game lotteries. *Id.* at *24-25.

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[7] Because Delaware likewise shares in the revenues earned by the video lotteries operated at these three facilities (a share increased by the 2009 legislation), the Sports Lottery Act allowed Delaware to earn new revenues not only from the sports lottery, but also from new customers attracted to "racinos" by the sports lottery. *See generally* AA 317-30.

Following the Delaware Supreme Court's favorable ruling, the State Lottery Director published proposed sports-lottery regulations. App. 4a; AA 167-90. Those regulations confirmed the Governor's stated intention to offer single-game betting and parlay betting. App. 4a; AA 168. Further, they broadly defined a "sports lottery" to include betting "'in which the winners are determined based on the outcome of any professional or collegiate sporting event, including racing, held within or without the State, but excluding collegiate sporting events that involve a Delaware college or university, and amateur or professional sporting events that involve a Delaware team.'" *Id.* State officials announced that the sports lottery would commence September 1, 2009, immediately before the 2009-2010 NFL season. App. 4a; AA 319. Delaware also intended to offer a lottery for baseball and college football, and to expand it thereafter to other sports. App. 4a.

On July 1, 2009, the Governor signed a budget for the fiscal year 2010. That budget was constitutionally balanced in part by the expected $17 million in revenues from a sports lottery. AA 330.

4. *The District Court Proceedings.* On July 24, 2009, roughly ten weeks after the Sports Lottery Act was enacted, the Sports Leagues filed this action. Count I of their Complaint alleged that PASPA limits Delaware "to reinstituting at most the three Scoreboard parlay games that were conducted in the fall of 1976." AA 29. Count II asserts that lotteries based on a single contest are not "lotteries" under the Delaware Constitution. *Id.* at 31.

On July 28, 2009, the Sports Leagues moved for a preliminary injunction based on Count I, seeking to enjoin Delaware from offering "(i) single-game sports betting, (ii) betting on sports other than . . . profess-

sional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976." AA 35. The Sports Leagues argued that PASPA forbids Delaware to conduct any game "other than one with the specific attributes of the sports lottery conducted by Delaware in 1976." *Id.* at 68.

The next day, the district court scheduled a teleconference. During the conference, the court raised questions about the Sports Leagues' irreparable-harm showing. AA 240, 265-66. The court did not rule on the preliminary-injunction motion, but instead ordered the parties to "meet-and-confer" about a "reasonably expedited" schedule. *Id.* at 267. The court set another scheduling conference for August 5, 2009.

On August 3, 2009, however, the Sports Leagues changed tack; they filed a letter suggesting that the court hold the preliminary injunction proceeding in abeyance and resolve Count I through partial summary judgment. AA 270-80. Under this approach, the Sports Leagues apparently sought to avoid demonstrating irreparable harm.

Delaware responded that day, agreeing that the parties had failed to reach a consensus on process and further arguing that the Sports Leagues must demonstrate irreparable injury to obtain a permanent injunction. AA 314-15. The following day the State also submitted affidavits to respond to questions raised at the initial conference about the lottery's expected revenues. *Id.* at 317-30. An affidavit from the State's Acting Secretary of Finance explained that Delaware's budget for fiscal year 2010 included a "conservative" estimate of $17 million of revenues from re-implementing the sports lottery over a ten-month period (albeit not including revenues from

single-game lotteries). *Id.* at 329-30. Of this amount, $3 million was attributable directly to the sports-lottery games and the remaining $14 million to additional video-lottery revenue from the commencement of the sports lottery. *Id.* Under the same forecast, approximately $15 million in additional revenue would be earned by the three venues offering the sports lottery. *Id.* at 330. Delaware also submitted affidavits on behalf of the three "racinos" that would operate the sports-lottery venues, explaining the negative impact that an injunction would have on their revenues, investments and hiring. *Id.* at 317-28.

At the August 5, 2009 conference, the parties remained divided about how the case should proceed. Delaware emphasized that it had not had an opportunity to submit a brief, take discovery, or present evidence on the merits. App. 37a. For example, Delaware had no opportunity to offer testimony demonstrating that its proposed lotteries are substantively similar to its prior lotteries, that it had considered expanding its prior lotteries to other sports in the 1970's and could have done so without fundamentally changing the games, and that it could be demonstrated that multi-game betting can be done in ways that replicate the results of single-game betting. See, *e.g.*, Ray C. Fair & John F. Oster, *College Football Rankings And Market Efficiency*, 8 J. Sports Econ. 3, 13 (2007). The Sports Leagues, however, claimed that the case could "be adjudicated on a summary proceeding." App. 35a.

The district court denied the preliminary-injunction motion at the status conference, concluding further briefing or factual development was unnecessary to denial of the motion. App. 40a. The court found that the Sports Leagues failed to establish a likelihood of

success on the merits. *Id.* at 41a-42a. Further, the court observed "there may exist factual disputes as to what, if anything, the State actually did in the past with respect to sports gambling; or, as to what, if any, proposed sports betting activities are exempted by the federal statute." *Id.* at 42a. The court also found that the Sports Leagues failed to establish that the traditional equitable factors supported an injunction. In particular, the court noted that the State "intend[ed] to use moneys raised from the activities at issue in this case to help balance the State's budget." *Id.* at 46a. The court ordered expedited discovery for a trial starting December 7, 2009. *Id.* at 46a-54a.

On August 7, 2009, the Sports Leagues appealed. App. 6a. On August 10, the district court confirmed its oral ruling with a written memorandum. *Id.* at 21a-28a.

5. *The Court of Appeals.* The Third Circuit expedited the appeal. It ruled from the bench immediately after oral argument on August 24, 2009, and issued its opinion on August 31, 2009, just prior to the planned start of the sports lottery. The court did *not* resolve whether the district court had properly refused to enter a preliminary injunction. Instead, the court *sua sponte* reached the merits and concluded that PASPA prohibited vital elements of Delaware's planned lotteries. App. 2a, 19a-20a.

The panel acknowledged that, in reviewing the grant or denial of a preliminary injunction, it should ordinarily "'go no further into the merits than is necessary to decide the interlocutory appeal.'" App. 8a-9a. Nonetheless, the court concluded that this Court created an exception to this procedure in *Thornburgh*, 476 U.S. at 757. There, this Court reached the merits on appeal of a preliminary injunc-

tion where there was "an unusually complete factual and legal presentation to address the important constitutional issues at stake" and the "'district court's ruling rest[ed] solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.'" App. 9a-10a (quoting *Thornburgh*, 476 U.S. at 757 & n.8). Although neither party asked the Third Circuit to rule on the merits, the court announced that it had "reviewed the record" and found no dispute about the material facts, which the court identified as the "scope and extent of Delaware's gambling scheme" in 1976 and now. *Id.* at 12a.

Turning to the "merits," the Third Circuit found the "to the extent" language in § 3704(a)(1) requires an examination of the "degree" to which a lottery was conducted by Delaware in 1976. App. 14a-15a. The court thus concluded that the scope of the § 3704(a)(1) exception is tied to the "specific means by which the lottery was actually conducted." *Id.* at 14a (emphasis omitted). The court apparently recognized, however, that taking this "plain language" interpretation to its logical conclusion would produce absurd results because it would require that any lottery conducted by Delaware "be identical in every respect to what the State conducted in 1976." *Id.* at 19a. The court thus created an "exception" to the § 3704(a)(1) exception, ruling "[c]ertain aspects . . . may differ" "as long as they do not effectuate a substantive change from the scheme that was conducted during the exception period." *Id.* The court did not address how a court or the parties should determine whether a proposed change is "substantive."

In so holding, the Third Circuit rejected the principal arguments advanced by Delaware. The court concluded that *Gregory*, 501 U.S. at 461 – which

requires a court to "'interpret a statute to preserve rather than destroy [a] State['s] substantial sovereign powers'" absent "'an unmistakably clear expression'" to the contrary by Congress – was irrelevant here because Congress in PASPA clearly intended to limit the ability of States to sponsor sports-gambling. App. 17a-18a. Likewise, the court held that PASPA's legislative history could be ignored – including statements that § 3704(a)(1) permitted excepted states to offer lotteries broader in scope than those previously conducted – on the grounds that the exception was "unambiguous" and, alternatively, that the legislative history was "inconclusive at best." *Id.* at 16a, 17a n.5.

Applying its reading of PASPA, the Third Circuit found that the proposed Delaware lottery went beyond what was permitted by the § 3704(a)(1) exception. Specifically, the court concluded that because Delaware "'conducted'" lotteries involving only NFL teams in 1976, it can only offer lotteries involving NFL teams and no other sports leagues today, even if the lotteries are otherwise identical to the 1976 games. App. 20a. In addition, because Delaware had previously offered only multi-game "parlay" lotteries, it could not now offer "single-game" betting. *Id.* The court did, however, state that Delaware could sell tickets at different venues than in 1976 and was not constrained by the schedule and number of teams that existed in 1976. *Id.* at 19a.

Following the Third Circuit's ruling, the district court entered a final order permanently enjoining Delaware from offering lotteries on sporting contests other than those involving the NFL and requiring the lottery to consist of a parlay of at least three NFL games. *Office of the Comm'r of Baseball* v. *Markell*, No. 09-538 (GMS) (D. Del. Nov. 9, 2009) (Final

Order). Delaware currently sponsors such a limited sports-lottery.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether PASPA precludes Delaware from operating sports lotteries that were created as part of a comprehensive effort to address the State's fiscal crisis. Although PASPA generally prohibits sports-related gambling by States, it preserves the right of certain States to operate a sports lottery "scheme . . . to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." 28 U.S.C. § 3704(a)(1). The Third Circuit's narrow reading of this exception intruded on Delaware's sovereignty in a circumstance where there was no "reason to believe, either from the text of the statute, the context of its enactment, or its legislative history, that Congress . . . intended such an alteration of the federal balance." *Hayden* v. *Pataki*, 449 F.3d 305, 325 (2d Cir. 2006) (en banc). And, the Third Circuit reached this holding in a procedural posture that was manifestly unfair to Delaware.

I. THE THIRD CIRCUIT WRONGLY CONCLUDED THAT CONGRESS HAS PROHIBITED DELAWARE FROM ADOPTING A SPORTS-LOTTERY SCHEME TAILORED TO MEET ITS REVENUE-GENERATING NEEDS.

1. PASPA is clearly an intrusion on state sovereignty, as the Department of Justice recognized in commenting on the legislation. See *supra* n.4. Thus, the starting point for interpreting PASPA's application in this case is the seminal decision in

Gregory, 501 U.S. at 461. There, this Court held that "'[i]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" *Id.* at 460. "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. See also U.S. Const. amend. X.[8]

The Third Circuit's analysis is flatly contrary to *Gregory*. According to that court, *Gregory* was inapplicable because PASPA "unmistakably prohibits state-sponsored gambling." App. 18a. Although true, the court of appeals' statement misses the relevant point. In *Gregory*, it was likewise true that the Age Discrimination in Employment Act ("ADEA") requirements at issue were generally applicable to States. See *Gregory*, 501 U.S. at 467 ("the ADEA plainly covers all state employees except those excluded by one of the exceptions"). But the Supreme Court nonetheless determined that a clear statement by Congress was required before the ADEA's restrictions on state mandatory-retirement laws could be read to apply to a particular group of state officials (judges). *Id.* Specifically, this Court found that even though it was unclear whether judges were "policymakers" and

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[8] Since *Gregory*, this Court has reaffirmed this foundational principle of state sovereignty. *See, e.g.*, *Raygor* v. *Regents*, 534 U.S. 533, 543-44 (2002) (clear-statement principle "applies when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in 'traditionally sensitive areas' that 'affec[t] the federal balance.'") (quoting *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).

thus within a statutory exception to ADEA coverage, it "w[ould] not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Id.*

Gregory thus instructs that PASPA can be construed so as to interfere with the exercise of sovereign powers by Delaware only if it is "unmistakably clear" that Congress intended such a reading. As this Court has explained, under *Gregory*, when a court is "confronted [with] a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers .... absent a clear indication of Congress' intent to change the balance, the proper course [is] to adopt a construction which maintains the existing balance." *Salinas* v. *United States*, 522 U.S. 52, 59 (1997); see also *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 140 (2004) ("federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires").

Indeed, *Gregory*'s federalism principles apply with particular force here because Delaware is exercising the core sovereign function of raising revenues in order to comply with its constitutional balanced-budget requirement. See, *e.g.*, *Leigh* v. *Green*, 193 U.S. 79, 89 (1904) (states have a "sovereign power to raise revenues essential to carry on the affairs of state and the due administration of the laws").

Certiorari is necessary to correct the Third Circuit's failure to follow *Gregory* and its concomitant decision to read PASPA as precluding Delaware from taking the steps it deemed necessary to help resolve its fiscal

crisis. The scope of the § 3704(a)(1) exception is, at minimum, ambiguous. To be sure, the Third Circuit initially suggested that the provision is "unambiguous" and turns on the "specific means by which the lottery was actually conducted." App. 14a-16a (emphasis omitted). Yet, the Third Circuit immediately thereafter determined that the § 3704(a)(1) exception must be given a broader interpretation to prevent "'absurd'" results and achieve the "policy" objectives of PASPA. *Id.* at 19a. To reflect these considerations, the court ultimately announced that § 3704(a)(1) permits Delaware to make changes from "the specific means by which the lottery was actually conducted" in 1976 so long as those changes are not "substantive." *Id.* at 14a, 19a (emphasis omitted).

The Third Circuit's own interpretation of PASPA thus recognizes that § 3704(a)(1) does not require Delaware's current lottery to be "identical" to its 1976 lottery and instead permits a range of differences. The statute, however, provides no "clear statement" that the line be drawn in the manner directed by the court of appeals. Nothing in PASPA's text suggests what a "substantive" change is, let alone makes that the touchstone for evaluating the exception's scope.

In contrast, Delaware advanced a reading of the § 3704(a)(1) exception that was faithful to its text and that "read [the provision] in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 140. Although Delaware acknowledges that the PASPA exception does not allow Delaware to offer any sports-gambling scheme it chooses, it can reasonably be read to allow the State to offer sports-lottery games that the State's 1970's scheme permitted. At least, it preserves the State's right to offer games akin to those that were part of the 1970's scheme. Even if Delaware's reading of the exception

is not compelled by the plain language, it is plausible and thus compelled by *Gregory* and its progeny.

First, although the Third Circuit concluded that phrase "to the extent" in § 3704(a)(1) should be interpreted to mean "the specific means by which the lottery was actually conducted," App. 14a (emphasis omitted), or the "degree[] to which" the lottery was actually conducted, *id.* at 15a, this phrase can just as easily be read to mean "if" a lottery was conducted in the designated period. *Id.* at 19a. Under such a reading, the phrase "to the extent" identifies a condition for application of the exception – *i.e.*, that a state-controlled lottery was conducted prior to PASPA.

This reading of the phrase is reinforced by PASPA's structure. Congress used the same "to the extent" phrase in another of PASPA's exceptions, § 3704(a)(3). In that exception, the phrase is clearly used as a synonym for "if."[9] Courts generally "conclude that Congress intended the same construction of the same language in [a] parallel provision." *Hillsboro Nat'l Bank* v. *Comm'r*, 460 U.S. 370, 402 (1983); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

In conclusory fashion, the Third Circuit opined that it was inappropriate "to draw parallels" between § 3704(a)(1) and § 3704(a)(3) because the latter "deals with casinos[,] differ[ing] in subject matter, structure, and syntax from the language of § 3704(a)(1)." App. 15a-16a. The court's conclusion is belied by a simple comparison of the two provisions. Both § 3704(a)(1) and § 3704(a)(3) share similar, if not identical,

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[9] The full text of § 3704(a) is set forth at App. 63a-64a.

structural and syntactic elements. Each exception begins with a clause detailing a broad class of gambling-related activity that is then followed by a second clause – beginning with "to the extent that" – which specifies the type of activity among this broad class that is exempt. As for § 3704(a)(3)'s focus on casinos, the Third Circuit fails to provide any explanation as to why the difference in subject matter should override the structural and syntactic similarities between the two exceptions, especially since both § 3704(a)(1) and § 3704(a)(3) aim to impose some limits on the expansion of gambling in exempted states.

Second, the term "scheme" can fairly be read at a level of generality which permits lotteries that follow the same structure as the prior lotteries but vary as to details, such as the sports league to which they are applied. In this context, that would mean the "scheme" that Delaware conducted was a lottery under State control in which winners of lottery games were affiliated with the outcomes of sporting events. Read this way, Delaware's lotteries fit comfortably within § 3704(a)(1) if they do not fall outside these essential parameters.

The Third Circuit's narrow construction of "scheme" to include only "multi-game parlays involving only NFL teams" is not compelled by the plain language. This Court has recognized that "scheme" is "'hardly a self-defining term.'" *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229, 241 n.3 (1989). Even the term's contemporaneous dictionary definition broadly states that a "scheme" is a "design or plan formed to accomplish some purpose; a system." *Black's Law Dictionary* 1344 (6th ed. 1990).

2. Given the ambiguity in the reach of § 3704(a)(1), the Third Circuit should have considered PASPA's

legislative history. See, *e.g.*, *O'gilvie* v. *United States*, 519 U.S. 79 (1986). That history confirms that Congress intended to preserve Delaware's right to conduct a state-controlled sports lottery and did not restrict Delaware to the specific sports or rules used to flesh out that scheme in the 1970's. At a minimum, the legislative history – like the statute – is not "unmistakably clear" that Congress intended the narrow reading of the PASPA exception adopted by the Third Circuit.

For example, the Third Circuit expressly held that Delaware retained the power to offer a sports lottery only to the "degree" it had "*actually* conducted" a sports lottery. App. 14a-15a (emphasis omitted). But this re-writes the statute in a manner contrary to Congress' intent. As explained *supra* at 11-12, earlier versions of PASPA included language that limited the exception to activities or schemes that were "*actually* . . . conducted." S. 474 (Feb. 22, 1991); *id.* (Nov. 23, 1991) (emphasis added). Ultimately, however, Congress struck the term "actually," thus broadening the § 3704(a)(1) exception. It enhanced this effect by changing the formulation from the preservation of "the *particular scheme* conducted" to preservation of "the scheme conducted." See *supra* at 11-12. "Where Congress includes limiting language in an earlier version of a bill but deletes its prior to enactment, it may be presumed that the limitation was not intended." *Russello*, 464 U.S. at 23-24. In effect, the Third Circuit imposed a particularity requirement that Congress had rejected.

Likewise, as described *supra* at 9-10, the Senate Judiciary Committee Report and sponsor statements during Senate debate uniformly contradict the Third Circuit's narrow reading of § 3704(a)(1). The Senate Judiciary Committee Report expressly states:

> Under paragraph (1) of subsection (a), Oregon and Delaware may conduct sports lotteries on any sport, because sports lotteries were conducted by those States prior to August 31, 1990. Paragraph (1) is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act.

S. Rep. No. 102-248, at 10. See *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'") (alteration omitted) (quoting *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969)).

This expansive reading of the exception was repeated by PASPA's floor manager and co-sponsor, Senator DeConcini, when explaining the scope of the exception to his colleagues in the Senate as they began to debate the bill:

> The intent of the legislation is not to interfere with existing laws, operations or revenue streams. Therefore, it provides an exemption for those sports gambling operations which already are permitted under state law.

138 Cong. Rec. at 12973. Because Senator DeConcini was a sponsor and floor manager for the legislation, his "statement[s] to the full Senate carr[y] considerable weight." *Corley* v. *United States*, 129 S. Ct. 1558, 1569 (2009); see also *Babbitt* v. *Sweet Home*

Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

The Third Circuit mischaracterizes this legislative history as constituting "'cherry-picked' snippets [that] offer no consistent insight into Congressional intent." App. 17a n.5. Although the legislators who discussed the PASPA exceptions tended to phrase the breadth of the exception in slightly different ways, that merely underscores the inherent ambiguities in the statute. But more fundamentally, the Third Circuit did not identify any "clear statement" in the legislative history that Congress intended the PASPA exemption to be given the narrow reading adopted by that court. To the contrary, as noted, the most relevant legislative history shows that Congress intended to permit Delaware to conduct a much broader array of gambling activities.[10] Far from "cherry picking," Delaware cites statements made by the formal report of the Senate Judiciary Committee and a sponsor and floor manager of the Senate bill.

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[10] The Third Circuit discusses only the Senate Report. It notes that, after explaining that the § 3704(a)(1) exception was "'not intended to prevent . . . Delaware from expanding [its] sports betting schemes into other sports as long as it was authorized by State law,'" App. 17a n.5 (omission in original), the Senate Report states that the exception "'does not intend to allow the expansion of sports lotteries into head-to-head betting.'" *Id.* The latter statement suggests a narrower reading of the exception than that advanced by Delaware; but, relevant here, it also supports a much broader reading of § 3704(a)(1) than given by the Third Circuit. The court's decision to ignore the history was the result of its erroneous application of *Gregory* and its conclusion that PASPA's language is plain.

II. THE THIRD CIRCUIT ERRED BY DECIDING THE MERITS OF THE CASE ON REVIEW OF A PRELIMINARY INJUNCTION.

On appeal from the denial of a preliminary injunction, see 28 U.S.C. § 1292(a), the Third Circuit invalidated Delaware's sports lotteries and announced sweeping prohibitions on the State's future sports lotteries (*viz.*, no games involving sports other than NFL football and no single-game lotteries, App. 20a). The Sports Leagues did not ask the appellate court for this relief, and neither this Court nor any other court of appeals would have taken this extraordinary step in similar circumstances.

"[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Camenisch*, 451 U.S. at 395. This Court has made clear that it should be done only where "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Thornburgh*, 476 U.S. at 757.

Here, the court of appeals asserted that there was no dispute about what sports-lottery games Delaware had conducted in the past or what games Delaware proposed to conduct in the present, and therefore that there were no material factual disputes at all. App. 11a-12a. But, the court itself stated that PASPA does *not* "require[] Delaware's sports lottery to be identical in every respect to what the State conducted in 1976," and that only "substantive changes" were precluded. *Id.* at 19a. That determination should have led it inexorably to the conclusion that there are material disputes of fact about what differences between the 1970's lottery and the current lottery are *substantive*.

Those are not legal questions that can be decided by judges without factual development.

The Third Circuit, however, believed that it could determine as a matter of law what differences between schemes are substantive, apparently based on its own knowledge of sports and sports gambling. But questions about the substantiality of differences are not legal questions. These questions are inherently factual, requiring evidence from persons with expertise in lottery games and sports gambling.

For example, Delaware would have offered evidence that certain changes were not substantive, such as (i) conducting the same lottery game formerly using a slate of NFL games with a slate of MLB or NHL games, or (ii) conducting single- or double-game lotteries instead of three-game lotteries. Delaware was prepared to offer expert testimony about the differences among types of lottery games and whether those differences were substantive. See *supra* at 17.

Once one acknowledges that it would be absurd to confine Delaware to the precise games offered in the 1970's, as the Third Circuit did, see App. 19a, then plainly, there are factual disputes about how much difference is truly substantive. These factual disputes are significant. For example, if Delaware can show that using a slate of MLB games on a Tuesday does not substantively change a lottery game involving a slate of NFL games on a Sunday, it may be able to conduct games year-round, making the lottery substantially more efficient and profitable for the State.

Moreover, this appeal arose from district court proceedings that exemplify the limitations inherent in emergency proceedings. Plaintiffs filed their complaint on July 24, 2009 and motion for a

preliminary injunction on July 28, 2009, with the lottery games scheduled to begin in early September. An initial conference was set the next day giving the State the opportunity only to oppose the motion orally. Although the district court heard limited argument on the motion, the focus was on irreparable harm. AA 240, 247-50, 265-66. The court directed that the parties to "meet-and-confer" about how the case should proceed in advance of another scheduling conference to be held August 5, 2009. *Id.* at 267.

During that period, Delaware sought to provide the court with answers to questions raised at the hearing about the impact that a preliminary injunction would have on Delaware's lottery revenues. AA 317-30. In contrast, the Sports Leagues filed a 10-page single spaced "letter" seeking resolution of the matter on an expedited summary judgment motion and without discovery. *Id.* at 276-77.

At the August 5 status conference, the court denied the Sports Leagues' motion. App. 40a. The court recognized that the State had not taken discovery on "what, if anything, the State actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." *Id.* at 42a; see also *id.* at 46a. And while the trial court set a discovery schedule to permit factual development, the Third Circuit stopped that process dead in its tracks by *sua sponte* deciding the merits.

Accordingly, the State "had the benefit neither of a full opportunity to present [its] case[] nor . . . a final judicial decision based on the actual merits of the controversy." *Camenisch*, 451 U.S. at 396. And, because the court *denied* the preliminary injunction without any written submission from the State, the record that went to the Third Circuit did not even

include the legal arguments and factual evidence that the State would have submitted in opposition to plaintiffs' motion. The appellate court's *sua sponte* merits decision was fundamentally unfair to the State.

This case is a poster child for the proposition that federal appeals courts should rarely convert a preliminary-injunction appeal to a merits appeal. It was too easy for the Third Circuit to brush past factual disputes that seem commonsensical only because the record is wholly undeveloped. The Third Circuit's decision of the merits here conflicts with this Court's decisions and those of other circuits which refuse to conduct merits review of appeals arising from preliminary injunction orders without absolute certainty that no relevant factual disputes exist. See, *e.g.*, *Siegel* v. *LePore*, 234 F.3d 1163, 1171 n.4 (11th Cir. 2000) (en banc) (per curiam) ("Mere expediency does not warrant this Court reaching the merits of Plaintiffs' claims [on appeal from a preliminary injunction ruling] in the absence of the necessary evidence by which to do so"); *Sierra On-Line, Inc.* v. *Phoenix Software, Inc.*, 739 F.2d 1415, 1421-22 (9th Cir. 1984) ("The case is in the early stages of discovery; the record is not well developed. This Court will not attempt now to decide conclusively the merits of the case."); *W. Va. Ass'n of Cmty. Health Ctrs., Inc.* v. *Heckler*, 734 F.2d 1570, 1579 (D.C. Cir. 1984).

* * * *

The Third Circuit's decision finally resolves the scope of Delaware's authority and deprives Delaware of the right to exercise an historic revenue-raising power that Congress preserved for it – and does so in a truncated and fundamentally unfair proceeding. Cf. *Heckler* v. *Redbud Hosp. Dist.*, 473 U.S. 1308,

1314 (1985) (Rehnquist, J., in chambers) (staying preliminary injunction requiring agency to promulgate regulations, and stating "the District Court has inappropriately used its 'preliminary injunction' as a vehicle for final relief on the merits"). Only this Court's review can prevent Delaware from being permanently deprived of a sovereign right through the vehicle of an inequitable proceeding.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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